KUALA LUMPUR KEPONG BHD

v.

SUBRAMANIAM SINNAPPAN & ORS

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[APPEAL NO: 16-1-1995]
27 AUGUST 1997

LABOUR LAW: *Employment - Adjudication by labour officer - Deduction of wages - Whether deduction unlawful - Whether decision to deduct tainted with procedural unfairness - Whether labour officer acted beyond jurisdiction - Principles of approbation and reprobation - Applicability - Employment Act 1955, ss. 24, 69, 73, 77*

This was an appeal against the decision of the labour offices ordering the appellant to pay the sum of RM1,325.69 to the respondents being short payment of wages. The appeal was based on the following grounds, namely: (1) that the labour officer's decision was a nullity by reason of procedural unfairness in that the appellant's amendment to the claim was made *ex parte* and that the labour officer had failed to issue an amended summons; (2) that the labour officer had acted beyond his jurisdiction under s. 69 of the Employment Act ('the Act') by unilaterally varying the terms of the employment of the respondents; (3) that the labour officer had erred in law when he ruled that the shortfall in weight was a deduction of wages as this was contrary to s. 24 of the Act; and (4) that the labour officer had erred in law in failing to apply the principle of approbation and reprobation.

Held:

[1] Based on ss. 69-72 of the Act, the amendment of the claim done *ex parte* was perfectly in order. There was no need for the labour officer to issue an amended summons. Also, based on the evidence, it was shown that the originating summons was served on the appellant. Details of the amended claim were forwarded to them by the labour court. The appellant therefore had been made fully aware of the details of the amended claim. There was therefore no breach of natural justice or unfairness on the part of the labour officer.

[2] The findings and the grounds of judgment of the labour officer clearly showed that he made no finding which purported to unilaterally vary the terms of employment of the respondents. What he decided was that the appellant had no right to make deductions from the wages of the respondents unless the deductions were in accordance with s. 24 of the Act. There was nothing improper about that finding.

[3] The Act prevents an employer from making any kind of deductions from the wages of an employee except those provided in s. 24(2) of the Act. The labour officer therefore ruled correctly that the deductions made in wage slips of the respondents were not within those authorised by s. 24.

[4] For the application of the principle of approbation and reprobation, there must be an unequivocal and express election by the claimant of one of two benefits offered. No election had taken place on the facts of the case. Instead this was an unlawful deduction by the appellant from the respondents' wages. In any event, based on s. 24(2)(b) of the Act, an employer was prevented from reclaiming from an employee by means of deductions any overpayment of wages by mistake save those made within the immediate three months preceding. It was the intention of Parliament to put a limit to the principle of approbation and reprobation when applied to wage over payments.

[Appeal dismissed.]

Case(s) referred to:
Lee Kim Seng v. Acme Canning Sdn Bhd [1997] 2 MLJ 141 ***(foll)***
Mohamad Safuan Wasidin & Anor v. Mohd Ridhuan Ahmad (an infant) [1994] 2 MLJ 187 ***(dist)***
Ram Singh v. Bright Steel Sdn Bhd [1988] 2 MLJ 23 ***(dist)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(dist)***
Sagar v. H Ridehalgh & Sons [1931] 1 Ch 310 ***(refd)***
Shamsiah Ahmad Sham v. Public Services Commision, Malaysia & Anor [1990] 3 MLJ 487 ***(dist)***
Sulaiman Mohamad v. Malayan Banking Bhd [1992] 2 MLJ 116 ***(dist)***

Legislation referred to:
Courts of Judicature 1964, s. 28(1)
Employment Act 1955, ss. 24, 29, 69, 70, 71, 72, 73, 77

For the plaintiff - N Sivabalah (S Suganthi with him); M/s Shearn Delamore & Co
For the respondent - Sivarasa Rasiah; M/s Daim & Co

Reported by Mariette Peters-Goh

JUDGMENT

Faiza Tamby Chik J:

This is an appeal against the decision of the labour officer, Rawang, Selangor. The decision was handed down on 2 July 1994 ordering the appellant to pay the sum of RM1,325.69 to the respondents being the short payment of wages between the period of July 1986 and September 1990.

The memorandum of appeal (pp. 1 to 3 of the appeal record) contains seven grounds of appeal but this can be broadly divided into the following four grounds:

(i) The labour officer's decision is a nullity by reason of procedural unfairness/ impropriety (Paras. 1 and 3 of the memorandum of appeal);

(ii) The labour officer had acted beyond its jurisdiction under s. 69 of the Employment Act by unilaterally varying the terms of employment of the respondents. (Para. 4 of the memorandum of appeal);

(iii) The labour officer erred in law when he ruled that the shortfall in weight was a deduction of wages which was purportedly in breach of s. 24 of the Act (Para. 5 and 6 of the memorandum of appeal); and

(iv) The labour officer erred in law in failing to apply the principle of approbation/reprobation [Para. 7 of the memorandum of appeal).

The appellant submitted that as the amount involved was only RM1,325.69 the grounds of appeal as contained in the memorandum of appeal will only be limited to the questions of law.

It was submitted by the respondent that the notice of appeal was defective in law as it failed to set out the questions of law raised in the appeal. In support the respondents referred to the case of *Sulaiman bin Mohamad v. Malayan Banking Bhd* [1992] 2 MLJ 116 at 119 where Lamin J (as he then was) said, "I am of the view that in the case of an appellant intending to appeal on a question of law, the notice of appeal in form 140 must state at least in general form the question or questions of law that he wished to appeal on." In *Mohamad Safuan bin Wasidin & Anor v. Mohd. Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187 at p. 192 Abdul Malik Ishak JC (as he then was) said, "In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000, the notice of appeal in form 140 must state generally the question or questions of law that he wished to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and consequently, would nullify the appeal." In this instance all that is stated in the notice of appeal is that the labour officer committed errors of law without setting out what the questions of law are.

Section 28(1) of the Courts of Judicature Act 1964 (CJA) provides, "Subject to any other written law, no appeal shall lie to the high court from the decision of a subordinate court in any civil cause or matter where the amounts in dispute or the value of the subject matter is ten thousand ringgit or less except

on a question of law." It can be seen here that the present case is neither an appeal from a civil case or matter nor from a subordinate court. Both the *Sulaiman's* case and *Mohd Safuan's* case dealt with civil appeals from the subordinate courts and were not appeals from the labour officer's decision. The current appeal emanates from an express right conferred to the appellant under s. 77(1) of the Employment Act which states; "If any person whose financial interests are affected is dissatisfied with the decision or order of the director-general under s. 69 or s. 73 such person may appeal to the High Court." Section 77(1) does not place any limitation on the value of the appeal and, accordingly, s. 28(1) of CJA does not apply to the present appeal.

As to the first ground of appeal, what is now called procedural unfitness and impropriety, the appellant's arguments may be summarised as follows:

(a) The amendment to the claim was made *ex parte* (para 5.1);

(b) The labour officer failed to issue an amended summons (para 6.2);

(c) No notice was given to the appellant of the amended claim (para 8);

(d) The 43 complainants did not give a statement to the labour officer for the amended claim (para 9)

The point that the amendment to the claim was made *ex parte* was in fact not at all raised in the memorandum of appeal and could be disregarded. Be that as it may, a reading of ss. 69 to 72 of the Employment Act will show that the presentation of the complaint to the director general, the examination on oath of the complainant, the recording of the complaint and the subsequent inquiries done by the director general are all done *ex parte*. Hence amendment of the claim done *ex parte* is perfectly in order and within the provisions of the procedures as intended by the legislature.

There is no need for the labour officer to issue an amended summons as s. 70. (c) provides expressly that he "may summon in the prescribed form", the person complained against. Further there is an express proviso in the section as follows:

> Provided if the person complained against attends in-person before the Director-General it shall not be necessary to serve a summons upon him

The appellant in this case after having received full notice of the amended claim, proceeded to defend the amended claim and led evidence on the issues in the amended claim in the enquiry before the labour officer. The appellant did not object at the outset of the enquiry that it required to be served an amended summons or did not know the nature of the amended claim.

It is essential and in accordance with natural justice that the appellant be given notice and particulars of the amended claim so that they have a full opportunity to respond. In this regard the undisputed facts are as follows (see p. 72 of rekod rayuan (RR)). The original summons was served on the appellant on 19 November 1990. They subsequently communicated in writing with the labour officer and also attended before him. Details of the amended claim were forwarded to them by the labour court by cover of letter dated 15 October 1991 (see copy received by respondent). The appellant had therefore been made fully aware of the details of the amended claim well before the hearing commenced on 23 January 1992. The appellant did not plead in their memorandum of appeal that they had no notice of the claim. There was no breach of natural justice or unfairness on the part of the labour officer.

The issue of the 43 complainants not giving a statement to the labour officer for the amended claim was also not pleaded in the memorandum of appeal and could be disregarded. In any event, it was submitted that it had no merit in law as the provisions of s. 72 of the Employment Act 1955 provided clearly that one employee may make a complaint and attend and act on behalf of and generally to represent a group of employees.

In summarised form the appellant argued that the labour officer had been blatantly unfair by reason that this order in form C dated 7 July 1994 (see p. 11 RR) was based on the computation in lampiran A (see p. 12 RR).

Firstly, the order of the labour officer is as follows: "Membayar ... sebagai bayaran terkurang ... seperti Exhibit D (7) dan Lampiran A. The Labour Office made express reference to Exhibit D (7) and not only Lampiran A."

What is exh. D(7)? This document was produced by the appellant itself during the inquiry (see pp. 262-286 RR). In D(7) the appellant summarised all the "short" deductions made by the appellant from the respondents' wageslips for the period stated therein. These are the appellant's own figures. Lampiran A is simply a conversion of the kilogram figures in exh. D(7) into a monetary figure based on wages of 32 cents per kilo (up to 1988) and 35 cents per kilo (for 1989 and 1990). These wage figures were stated by the chief complainant in his evidence (see p. 25 RR) and also in the detailed claim forwarded to the appellant (see p. 6 RR). The computation in lampiran A were figures of the wages per kilo which have never been challenged by the appellant at any-time during the inquiry. Lampiran A contains no new information and was based completely on the appellant's own figures in exh. D(7).

On these facts, what is there to cross-examine on the lampiran A when it was based completely on the appellant's own figures? The appellant had never said at any time in the labour inquiry that the figures in lampiran A were wrong or not based on exh. D(7).

The appellant had referred to several case authorities in support of their contention. They are:

1. *Ram Singh v. Bright Steel Sdn. Bhd* [1988] 2 MLJ 23
2. *Shamsiah bte Ahmad Sham v. Public Services Commision, Malaysia & Anor* [1990] 3 MLJ 364
3. *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487

(a) In *Ram Singh's* case, the labour officer relied in error for a claim of overtime on a written record kept by the claimant's daughter where the daughter was never called as a witness. He therefore dealt with the entire claim based on hearsay evidence. This is a far cry from the instant case where exh. D(7) setting all the details of "short" deductions is from the appellant itself.

(b) *Shamsiah bte Ahmad Sham's* case is correct on its own distinguishable facts and does not assist the appellant. Shamsiah was dismissed as a civil servant for negligence and dereliction of duty. Her appeal to the Supreme Court was allowed on the ground that her past record which include several disciplinary actions was taken into account in making the decision to dismiss without giving her the opportunity to explain, contradict or rebut them. Again, these facts are a far cry from the facts in the instant appeal before me.

(c) *Rohana bte Ariffin's* case does not assist the appellant. In the case, an order of certiorari was issued, amongst other grounds, to quash a decision by the university disciplinary authority on the ground that relevant documents before the disciplinary authority which were requested by the applicant lecturers were not given to them when they were preparing to make their written representations to the said authority. Again the facts are completely different from the instant appeal.

The second ground is whether the labour officer had unilaterally varied the terms of employment of the respondents.

Paragraph 4 of the memorandum of appeal is set out as follows:

> ... beliau memutuskan bahawa pengiraan bayaran insentif patut dibuat mengikut timbangan getah yang dibuat di "Field Reception Station."

After a detailed consideration of the findings and the grounds of judgment of the labour officer (see supplementary appeal record (SAR) at p. 40-42) it will become clear that the labour officer made no such express finding. The labour officer never decided expressly that the payment should follow the weight at the field reception station. What he decided was that the appellant had no right to make deductions from the wages of the respondents unless the deductions made were in accordance with s. 24 of the Employment Act. What the appellant was doing was to use the individual dry rubber content (DRC) figure for each respondent stated in the "Getah Biasa" column to calculate the wages (see p. 91 RR for example of the wage slip and these figures). The appellant would then use the factory DRC weight which was a combined DRC reading (for all the tappers) to either reduce or increase the payment. What the labour officer therefore ruled was that the appellant could not use the factory DRC weight to make deductions from the respondents' wages except those wages permitted under s. 24. Hence this ground of appeal is misconceived completely. It raises an appeal against something that was never decided.

However, the appellant submitted that the labour officer had unilaterally varied the terms of the contract which he could not do. His argument in short, appears to be that the labour officer was obliged to hold that it was an implied term that payment was to be computed on the factory weight. Hence it would purportedly follow that the deductions made from the weight recorded from the individuals worker would be lawful.

On most occasions, the factory readings were higher than that of the field readings. It depends on the period taken and the quantum of the difference. For example in 1990 as shown in the notes of evidence at p. 7 of the SAR, there were deficits for nine months out of 12 with the quantum going up to 9.2 kg for a month.

There is therefore no evidential basis for the labour court to infer an implied term in the contract that the factory weight was the correct weight to use. With regard to the collective agreements, the first CA (exh. D2 (B) at pp. 198-224 RR.) valid from 1 May 1990 to 30 April 1993 and which covers the last six months of the claim expressly provides in cl. 27 (see p. 206 RR) as follows:

> At reception points, every opportunity will be given to the rubber tappers to observe when sample for determination of d.r.c. is taken.

The appellant cited the case of *Sagar v. H. Ridehalgh & Sons* [1931] 1 Ch 310 to try to support his argument for an implied term. It is submitted that this case is completely different and does not assist him. The case concerned as to whether deductions from wages for bad work by weaver workmen paid

on a piece rate basis were legal. The deductions were held to be permissible on the basis that firstly there was an established practice of making deductions for bad work and secondly there was a specific exception in the Trucks Act 1831 which made it illegal for employers to make deductions from workmen's wages, much like our s. 24 of the Act. On the facts of the instant appeal, there was no such accepted practice and secondly and most importantly, no exception was provided for within our s. 24 of Employment Act.

The third ground is whether the labour officer had erred in law in ruling that the deductions were contrary to s. 24 of the Employment Act 1955.

This issue is really the crux of the appeal. It is interesting to note that on the core issue in this appeal, all that is submitted by the appellant is that the labour officer committed "a total all misdirection of the law when he ruled that the short falls amounted to a deduction from the wages". No explanation is provided however as to why this is a 'total misdirection".

It is undisputable as pointed out by the labour officer in his "finding" and "grounds of judgement" that the incentive payment for the respondents was based on the weight of DRC brought in. If deductions in kilos were made in the "ruang bezaan", then this would mean that a deduction would be made in their wages. The Employment Act prevents an employer from making any kind of deductions from the wages of an employee, except those provided in s. 24(2). The labour officer therefore ruled correctly that the deductions made in wage slips of the respondents were not within those authorised by s. 24.

Now I come to the fourth and last ground which is approbation/reprobation.

In gist the point is as follows: that since the respondents had accepted the surplus payments before, they were now obliged to offset the short payments against these.

I am of the view that the principle is not applicable to the facts in the instant appeal. This becomes clear when one considers carefully the facts in the case of *Lee Kim Seng v. Acme Canning Sdn. Bhd.* [1997] 2 MLJ 141 which is cited by counsel for the appellant. Lee Kim Seng was employed as a supervisor in a food canning factory. He was given an option of being employed on daily rate where he would get overtime or on monthly rate whereby he would get certain allowances but no overtime. He opted for the monthly rate. He then resigned at some point and made a claim for overtime. The Federal Court dismissed his claim applying the doctrine of approbation or reprobation.

a It is clear therefore that for the principle to apply there must be an unequivocal and express election by the claimant of one of two benefits offered. No such election has taken place on the facts of the instant appeal. Here what we are talking about is an unlawful deduction by the appellant from the respondents' wages.

b There is also an express statutory prohibition within s. 24 of the Employment Act preventing an employer from claiming back from an employee by means of deductions any overpayment of wages by mistake save those made within the immediately preceding three months (see s. 24(2)(b)). Hence Parliament has chosen to put a limit to the principle of approbation and reprobation when *c* applied to wage overpayments. On the facts here, the appellant has chosen to make what it now claims are over payments to the respondents by using the factory based DRC weight. To attempt to set off these surplus payment against the illegal deductions would be contrary to the Employment Act.

d In the result, in my judgment, the appeal was devoid of merit. The appeal was dismissed with costs.

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